No. 12202

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS J. HUGHES,

Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona.

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Upon Appeal from the District Court of the United States for the District of Arizona.

This is an appeal from a final Judgment of the United States District Court for the District of Arizona in favor of the defendant and against the plaintiff upon a verdict directed by the court and from an order denying the plaintiff's Motion for a new trial.

In this brief the parties will be referred to by their designations in the District Court, viz., appellant as plaintiff, and appellee as defendant. References to the transcript of record will be indicated by page number in parenthesis.

I.

JURISDICTIONAL STATEMENT.

The plaintiff, a resident of Arizona, originally brought this suit in the Superior Court of Maricopa County, Arizona, by filing his complaint therein on January 31, 1948 against the defendant, The Mutual Life Insurance Company of New York, a New York Corporation, doing business in Arizona as a foreign corporation (2-17). The plaintiff, because of his becoming totally and permanently disabled, seeks, by his complaint, to recover from the defendant, the sum of $6,430.85 (9), exclusive of interest, on account of monthly income or disability benefit payments due the plaintiff under the terms of a certain life and health insurance policy issued him by the defendant (12-16). The plaintiff also seeks to recover the further sum of $1,368.12 (8), exclusive of interest, on account of annual premiums paid by him under protest. The plaintiff also seeks to recover interest, up to the time of filing his complaint, on said monthly income payments and annual premiums so paid, thereby making the total amount the plaintiff seeks to recover the sum of $9,142.97 (10).

On February 21, 1948, the defendant, by proper proceedings in said Superior Court,, caused said suit to be removed to the United States District Court for the District of Arizona (19-27).

Thereafter defendant filed its answer wherein it admitted the issuance of the policy, that plaintiff had

paid all premiums and that the policy was at all times in force and effect, but denied that the plaintiff had ever become totally and permanently disabled and denied that the defendant was indebted to the plaintiff in any sum whatsoever (27-30).

The jurisdiction of said District Court over the parties and the subject matter was invoked under Paragraph (1), Section 41, Title 28, United States Code, as it then existed, because: (a) the suit is between citizens of different states, the plaintiff being a citizen and resident of the State of Arizona and the defendant being a citizen and resident of the State of New York (20-21), duly qualified and authorized to do business in the State of Arizona as a foreign corporation; and (b) the value of the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

Jurisdiction is conferred upon this court to entertain and decide the case upon this appeal by Sections 1291 and 1294, Title 28 (new) United States Code, in that a verdict of the jury, directed by the court, for the defendant was returned on October 15, 1948, and on said date a final judgment in favor of defendant was entered on said verdict (34, 35). On October 22, 1948, plaintiff filed his Motion for New Trial (36), which, after having been taken under advisement on November 1, 1948 (38), was denied on January 12, 1949 (38). On February 8, 1949, plaintiff filed Notice of Appeal (39) and Cost Bond (39-41) and on February 17, 1949, filed his Designation of Record and

Proceedings to be Contained in Record on Appeal, together with the Reporter's Transcript of the Evidence (41-42).

II.

STATEMENT OF THE CASE.

On July 7, 1925, the plaintiff obtained from the defendant a life and disability insurance policy (12, 44), effective as of June 30, 1923 (14). The parts of certain provisions of the policy which are involved in and material to the consideration of this case are:

> "Benefits In the Event of Total and Permanent Disability Before Age 60.
>
> "When Such Benefits Take Effect.—If the Insured, after payment of premiums for at least one full year, shall, before attaining the age of sixty years and provided all past due premiums have been duly paid and this policy is in full force and effect, furnish due proof to the company at its home office . . . that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, . . . , the company, upon receipt and approval of such proof, will grant the following benefits: (13)
>
> "1. Waiver of Premium.—The company will, during the continuance of such disability,

waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the company must be paid in accordance with the terms of the policy, but if due after receipt of said due proof, will, if paid, be refunded upon approval of such proof (14).

"2. INCOME TO INSURED.—The company will, during the continuance of such disability, pay to the insured a monthly income at the rate of Ten Dollars for each one thousand dollars of the face amount of this policy . . . , the first such monthly payments being due on receipt of said due proof and subsequent payments on the first day of each calendar month thereafter, if the insured be then living and such disability still continue. No income payments, however, will be made prior to approval of such proof by the company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due. . . . (14)

"PROOF OF CONTINUANCE OF DISABILITY REQUIRED; RECOVERY FROM DISABILITY.—Although the proof of total and permanent disability may have been accepted by the company as satisfactory, the insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the company due proof of the continuance of such disability, and if the insured shall fail to furnish such proof, or if it shall appear to the

company . . . that the insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further premium shall be waived and no further income shall be paid (14).

"AMENDMENT PROVIDING ADDITIONAL BENEFITS IN THE EVENT OF TOTAL AND PERMANENT DISABILITY

The clause in this policy entitled "*Benefits in the Event of Total and Permanent Disability before Age 60*" is hereby amended by the addition of the provisions set forth hereunder and in no other respects:

I. Increased Income after 5 and 10 Years Continuous Disability.—If the Insured become entitled to the Disability Benefits specified in said clause, the monthly income per $1000 of the face amount of the policy shall, if the disability be continuous, be increased from $10, (a) to $15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to $20.00 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. If the Insured shall so recover and shall subsequently become totally and permanently

disabled, the monthly income payments during such subsequent disability shall commence at $10 per $1,000 of the face amount of this policy and shall each be of the same amount as if no such prior disability had existed (15).

II. Disability Presumed Permanent after 90 Days Continuous Disability.—If the Insured shall be totally disabled as defined in this policy for a continuous period of not less than ninety days, such disability shall, during its further continuance, be presumed to be permanent, but the Company shall have the right, anything in this policy to the contrary notwithstanding, to require proof of the continuance of such disability, during the first two years of such disability, at any time at which either a premium falls due or an income payment becomes payable, and after said two years, from time to time, but not oftener than once a year, as provided for in said clause in this policy." (15)

The plaintiff, Thomas J. Hughes, by occupation a farmer (111), ever since the year 1917 has owned a 412 acre farm and a dairy (122-124) which he farmed, managed and supervised, and where he did all kinds of farm work and labor himself until he became totally and permanently disabled in the year 1935, due to injuries and arthritis (44-45, 82-101). Ever since the year 1935 the plaintiff's disability and illness has increased and become progressively worse and he has been unable to manage or supervise his farm or do any work or perform any other acts except a few of a trivial nature (102-109, 82-101, 213-238). The

plaintiff's farm, as a capital investment, earns him an income. The plaintiff since becoming disabled has had to hire a foreman to supervise and manage his farm and dairy and others to do the farm and dairy work (106-138, 201-208).

Upon becoming disabled in 1935 the plaintiff made claim to the defendant for the payment to him of the monthly disability or income payments and waiver of payment of premiums under the above quoted provisions of his policy (45). After having submitted proof of his disability and having been examined by company doctors, the defendant accepted the proof, approved plaintiff's claim, and each month from July, 1935 to January, 1942, paid the plaintiff the monthly income payments and waived payment of the annual premiums each year until the premium which, but for the plaintiff's disability, would have been due on June 30, 1942 (46-52). Ever since January of 1942 the defendant has refused to pay any further monthly income, has refused to waive any further premiums, and has demanded payment thereof under threat of cancelling the policy. The plaintiff, not desiring to run the risk of losing his policy, paid under protest the annual premiums thereon for the years 1942 to 1947 inclusive (63-66, 101-102).

On January 31, 1948, the plaintiff brought this suit for the purpose of recovering from the defendant the aforesaid premiums so paid under protest, which amount to the sum of $1,368.12, and for the purpose

of recovering from the defendant the monthly income payments due him from January, 1942 to January, 1948, which amount to the sum of $6,430.85. The plaintiff also seeks to recover interest on the premiums so paid amounting to $253.08, and interest on said monthly income payments amounting to $1,090.92 at time of filing the complaint (2-17).

After removing the case to the District Court the defendant filed its answer wherein it admitted the issuance of the policy, that plaintiff had paid all premiums and that the policy was at all times in force and effect, but denied that the plaintiff had ever become totally and permanently disabled or entitled to waiver of premiums or to monthly income payments, and denied that the defendant was indebted to the plaintiff in any sum whatsoever (27-30).

A three day trial of this matter was had with a jury, commencing on October 13, 1948 (30, 31). At the close of plaintiff's case, defendant, without offering any evidence, moved the Court to instruct the jury to return a verdict for the defendant, upon the ground that the plaintiff's proof failed to establish that he had become totally and permanently disabled within the express provisions of the policy (238, 239).

After argument and due exception the court granted this motion (240-241), caused the jury to return a verdict for the defendant, and thereupon, on October 15, 1948, ordered entry of judgment for defendant. Whereupon such judgment was entered (34, 35, 241).

Plaintiff filed his motion for new trial on October 22, 1948 (36-37), which was taken under advisement on November 1, 1948, and denied on January 12, 1949 (38). Thereafter this appeal was taken and perfected (39-42).

III.

FACT IN DISPUTE AT TRIAL AND ISSUE RAISED AND TO BE DECIDED UPON THIS APPEAL

The only fact in dispute at the trial of this case was whether or not the plaintiff, during the period in question, was totally and permanently disabled within the meaning of the total and permanent disability clause of the insurance policy, so as to be entitled to the income payments and waiver of premiums. The only issue raised and to be decided upon this appeal is whether or not there was sufficient evidence at the close of plaintiff's case, to require submission to the jury of the question whether the plaintiff had suffered permanent and total disability from bodily injury or disease within the meaning of those terms as used in the insurance policy in question, and whether the trial court erred in holding that there was not sufficient evidence to require such submission to the jury.

IV.

SPECIFICATION OF ERROR.

The trial court erred in granting the defendant's motion to instruct the jury to return a verdict for the

defendant, and in denying the plaintiff's motion for a new trial, for the following reasons:

(a) That the evidence introduced by the plaintiff, taken as a whole, was sufficient to require submitting the case to the jury on the question of whether or not the plaintiff, Thomas J. Hughes, ever since the year 1935, had suffered permanent and total disability from bodily injury or disease, within the meaning of those terms as used in the insurance policy involved in the case at bar.

(b) That the evidence introduced by the plaintiff, taken as a whole, established that he was so disabled as to render him unable to perform, in a customary and usual manner, or at all, the substantial and material acts of his occupation or any other work for compensation, gain or profit, and, therefore, the issue of whether or not the plaintiff had become so totally and permanently disabled as to entitle him to the monthly benefit payments and waiver of premiums as provided under the terms of the insurance policy in question should have been submitted to the jury, in that the total and permanent disability contemplated by the total and permanent disability clause contained in said insurance policy does not mean, as its literal construction might be claimed to require, a state of absolute helplessness, but contemplates, rather, such a disability as renders the insured unable to perform in a customary and usual manner the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit.

(c) That the evidence introduced by the plaintiff, taken as a whole, showed him to be prevented from working with reasonable continuity in his customary occupation, or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity, and, therefore, the issue of whether or not the plaintiff had become so totally and permanently disabled as to entitle him to the monthly income and waiver of premiums as provided in the insurance policy in question should have been submitted to the jury, in that the total disability which prevents an insured from engaging in any occupation or performing any work for compensation, gain or profit, within the meaning of said insurance policy, is such a disability as prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity.

(d) In a case such as the case at bar, in which there was evidence of a capital investment and some management thereof by the insured, the test of the total disability of the insured is whether he would be able to procure employment in the open market in the same capacity in which he is managing his investments, and, under the evidence, was a question of fact for the jury to decide.

(e) That when the evidence shows an insured to be disabled, then the issue of whether or not the in-

sured is totally and permanently disabled from engaging in an occupation or doing any work for remuneration or profit, as those words are used in an insurance policy, becomes a question of fact for the jury to decide.

V.

ARGUMENT.

1. Preliminary Statement as to the Law and the Evidence.

It is the plaintiff's contention in this case that the evidence at the close of the plaintiff's case established that he suffered such a disability that he was unable to perform in a customary and usual manner, or at all, the substantial and material acts of his occupation, or any other occupation, for compensation, gain or profit, and was unable to work with reasonable continuity in his customary occupation or in any other occupation which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity. That under the law, an insured suffering a disability such as the plaintiff's, is totally and permanently disabled within the meaning of a disability clause of a policy providing for benefits in the event the insured shall become totally and permanently disabled from performing any work or following any occupation for compensation, gain or profit, and accordingly the trial court erred in holding otherwise by instructing a verdict for the defendant and in denying the plaintiff's motion for a new trial.

The words in an insurance policy that the insured "has become totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit and from following any gainful occupation" should have a liberal construction, as a literal construction would require a complete loss of physical power and mental capacity and it would scarcely happen that one could live and bring himself within the literal language of the policy. He would have to be absolutely helpless physically, and insane or in a coma. To hold otherwise would be to establish that this type of insurance is nothing more than a cheat, pretense and a fraud, as was said in:

> *Equitable Life Assur. Soc.* v. *Serio*, 155 Miss. 515, 124 So. 485.

That such liberal construction should apply is well established as will be seen from the cases hereinafter cited in this brief.

A proper determination of this case depends largely upon the evidence at the close of plaintiff's case. Accordingly, we deem it necessary to review the evidence at considerable length and in detail. In the case at bar we are dealing with a disabled farmer and believe it will be helpful in understanding the significance of the evidence if we comment on a case of a farmer suffering disability before reviewing the evidence.

In *Erreca* v. *Western States Life Ins. Co.*, 19 Cal. (2d) 388, 121 P. (2d) 689, the insured was a ranch executive. He made annual arrangements for crop financing, signed notes and mortgages, bought livestock and supplies. He customarily had determined the time for planting, harvesting and selling his crops, he acted as ranch superintendent, managed and supervised the farm work, did manual labor, operated ploughs and tractors, and repaired fences, buildings and farm machinery. Since becoming disabled, he can take short walks. He can perform no manual labor or inspect his lands. He can drive an automobile and negotiate loans and leases, sign notes and mortgages, talk with grain buyers, participate in buying supplies, and occasionally talks with his son concerning farm operations. The California Supreme Court held that although such acts are neither trivial nor inconsequential, they are duties that are infrequently and intermittently performed and cannot be said to constitute the substantial and material acts of the occupation of farming. The Court held that the insured was totally and permanently disabled within the meaning of those terms as used in his policy. The court further said that the magnitude of the insured's enterprise and his income therefrom were not to be considered in determining whether or not the insured was totally disabled from performing remunerative work within the meaning of the policy.

This case gives a review of the law as established in a number of the states. The fifth and tenth headnotes of the case read:

> "The term 'total disability' in a policy providing for disability benefits does not signify an absolute state of helplessness but means such a disability as renders insured unable to perform substantial and material acts necessary to prosecution of a business or occupation in customary way, and recovery is not precluded because insured is able to perform sporadic tasks or give attention to simple or inconsequential details incident to conduct of business.
>
> The question of what amounts to total disability within an insurance policy providing for benefits in case of total and permanent disability is a 'question of fact'."

2. Review of the Evidence.

The evidence in the case at bar is as follows:

That in 1932 the plaintiff, Thomas J. Hughes, was kicked by a mule, which resulted in several broken vertebrae for Mr. Hughes (44). This caused him to be confined to his bed about eight months (45). In 1935 he fell and broke his back, whereupon he made claim to the defendant for the monthly benefits and waiver of premiums under the disability provisions of his policy (45). The defendant approved the claim, notified plaintiff of this fact by letter of October 7, 1935, introduced in evidence as Plaintiff's Exhibit 1. (46-47). Prior to allowance of the claim plaintiff was examined by defendant's doctors, and thereafter from

time to time defendant requested and obtained further medical examinations. The plaintiff complied with every request for medical examinations and proof of his condition (47-50). After approval of plaintiff's claim, defendant waived payment of premiums each year up to and including the year 1941, and each month commencing with July, 1935, paid the monthly income up to and including the one falling due January 1, 1942 (50).

After income payments were started in 1935, plaintiff had gotten worse (50). In May, 1942, defendant by letter, in evidence as plaintiff's Exhibit 4, notified plaintiff that the proofs submitted were not sufficient to show him to be totally and permanently disabled, and advised that the company would not approve further benefits and that he must pay future premiums (51-52). This letter offered to give consideration to additional proof. Plaintiff, by letter dated June 1, 1942, offered to submit further proof and requested defendant to advise what further proof was desired (53-57). This letter is in evidence as Plaintiff's Exhibit 5 (55). Plaintiff submitted further proofs that defendant requested (58-59). Between January 1, 1942, and June 1, 1942, plaintiff furnished further proof and at request of defendant was examined by two of the company's doctors in Phoenix, Arizona, and another from Tucson, Arizona (59-62). The Tucson doctor stated to Mr. Hughes that he didn't see how plaintiff "could walk without braces on account of the arthritis was bad in the hip." (62).

After defendant had ceased paying benefits and had demanded payment of premiums and on June 27, 1942, plaintiff paid under protest the annual premium of $228.02, which but for plaintiff's disability would have been due on June 30, 1942 (63-64). The protest and grounds therefor are contained in a letter accompanying payment. This letter is in evidence as Plaintiff's Exhibit 7 (65-66). Plaintiff paid all further premiums under protest (101). Defendant admitted payment under protest in open court (65) and in its answer (29). The premiums so paid were for years 1942 to 1947 inclusive (101).

Since 1935 plaintiff's health has gotten worse and he has not been able to do any work whatever, has not been able to drive a tractor, and when he tried to drive one it was so painful and so adversely affected him that he could not do it, had to go to bed and even lie down in the field. He had to have hot pads applied, had to take medicine and could not sleep at night (102-104). Before plaintiff became disabled in 1935 he ran a ranch, baled hay, ran a harvesting and threshing machine, irrigated, did ploughing, and all kinds of ranch work. Since 1935 he has been unable to do any work. He is able to drive a pickup truck sometimes, and sometimes is able to drive his car to church on Sundays, but very little. Plaintiff's arm is so bad he has nearly lost the use of it (104). Both his arms, both hips, his back, his feet and his ankles, ever since 1935 have been "in a pretty bad fix." He cannot use his left arm at all. He is able to write some but it

gives him pain and he cannot sit still for any length of time due to the pain and stiffness he suffers. He suffers great pain when he walks. Whenever plaintiff attempts to work it gives him pain, he has to take medicine, lie down or go to bed (105-106).

Ever since plaintiff was injured he has been unable to run or supervise his farm and has had to employ a manager to run and supervise it (106). Ever since a time prior to getting hurt, plaintiff has been a member of the council of a Water User's Association, which regularly meets four times a year and sometimes has a special meeting. He cannot drive his automobile to attend these meetings, but has to depend on someone else to bring him. He is on a rural school board. Most of the meetings of the board are held at his home because of his inability to attend them at the school (107). Before being disabled plaintiff did all kinds of work that a farmer would do, repaired machinery and milked cows. Since becoming ill he has been unable to walk out in his fields or direct hired hands, and has been unable to do any milking. All this work he has had to hire done (108).

Cross-examination of the plaintiff brought out the following further facts: plaintiff in 1935 was farmer by occupation, did everything on the farm, and had followed that occupation most of his life. He had gone to a teacher's college or normal school three or four years, but had not gotten a teacher's certificate or ever taught school. He has been on a rural school board

since prior to 1935, attending meetings when he could, but could not attend all. He passed on the school budget as a member of the board (109-113). He owns 412 acres of irrigated land, where he has lived since 1917, has a dairy, and various farm crops are raised (122-124). Plaintiff milked cows before he got hurt (127). He had no foreman before he got arthritis (130). The foreman looks after whole ranch and everything (133). A part of the land he leased out (124). In July, 1948, plaintiff rode in an automobile to Santa Ana, California, but came back in about a week because his arthritis was hurting him so much he could not stay (131-132). He talked to his foreman about changing crops (133). Plaintiff purchased ten acres of land in 1940, and another forty acres in 1942. He executed a note for $2,000.00 and a mortgage (137-138). Plaintiff entered into various leases whereby he leased to others 185 acres of his farm (138-142). Plaintiff called a man and arranged to have him plough forty acres of land belonging to his sister, have it planted to grain, harvested and taken to mill (143-144). Plaintiff is better off financially now than before he got arthritis (145). He sells milk from his dairy to the Borden Company (145) and receives about $800.00 or $900.00 a month for it. He sells more milk now than in 1941 and for a better price (146). He was seventy-two years old at the time of trial on October 14, 1948 (155). Counsel for defendant had marked for identification plaintiff's account book and certain statements of the Borden Creamery (156-157). They were not offered or received in evidence. Plain-

tiff made bank deposits (159-160). Defendant's counsel then had marked for identification some deposit slips a few other papers and a large number of cancelled checks written by plaintiff in payment of bills, expenses, hired help and other items. None of these checks or other papers were offered or admitted in evidence. Defendant's counsel examined him at length concerning the checks. Plaintiff admitted writing them (160-184). The cross-examination further disclosed that plaintiff had borrowed money from time to time (181-183), and had acted as administrator of an estate (184, 185) because the decedent owned a mortgage on forty acres that he wished to pay and he could get no one else to act (190). Plaintiff went with son in automobile to Flagstaff, Arizona and Grand Canyon (191). Plaintiff got $4.10 a day for each meeting of the council of the Water Users' Association which he previously testified met four times a year (192). In 1942 he made a trip to Washington, D. C. for the Water Users Association (194), but his arthritis got so bad he had to stop in Kansas City where he was very sick and confined to bed (195). Plaintiff suffers a great deal of pain in his joints, arms, legs, knees and hips (196).

On re-direct examination it was further brought out that plaintiff before he became disabled prepared his own land, did his own baling, ran a thresher, did his own renovating and ploughing, and cut his own hay, but that he had to hire all this done after he became disabled (201-202). Plaintiff's joints give him

an awful lot of pain and are stiff (202). He received no compensation for being on the school board (202). He did not drive car on trip to Flagstaff and Grand Canyon (203-204). He can still write checks (204). Since becoming disabled he cannot go out in the fields to determine when his alfalfa should be cut (204-205); that it is necessary to get out around the ranch to properly supervise it, but since becoming disabled he can not do this. It has to be done by his foreman. He had no foreman before he got crippled (205). On his trip to Washington he did not take his cane, but had to get one because he could not get along without it, and he suffered more pain (205-206). When he tries to work he suffers so much pain in his spine that it makes him sick at the stomach and he has to lie down, and if he tries to move about in the fields he suffers pain all over his knees, ankles and joints (206). He is making more money than in 1940 or 1941 because of increased prices (207). The normal school attended by plaintiff combined high school and normal school subjects (207). When he acted as administrator of an estate for a time, the attorneys did all the work (208).

Roy Painter, a neighbor and witness for plaintiff, testified in part as follows: That in 1935 plaintiff was getting awfully stiff. He has seen him frequently since then, and has been to his place many times. (213). That he is on the school board with plaintiff, board meetings of which are often held at plaintiff's home because he is unable to attend elsewhere on account of

his arthritis and crippled-up condition (213). Since 1935 has seen plaintiff try to drive tractor only once, but not for very long as it made him sick and he complained of pain (214). That plaintiff is very stiff, and since 1935 Painter has seen him do work but very few times. When plaintiff attempted the one time to drive tractor to scrape borders, he had to quit, go to the house and lie down. That almost everytime he went to plaintiff's place plaintiff was lying or sitting down. He does not walk out over his farm (215). Before plaintiff got in his bad condition he did all his own work, baling hay, threshing, plowing and disking, but since plaintiff became crippled up he has had to have all his work done by others, called "custom contracting" (216).

Plaintiff's witness H. A. Evans (220) testified in part: That he has known plaintiff for thirteen years; has seen and been to plaintiff's place many times; that upon coming to plaintiff's place plaintiff would either be in a chair or lying down; that when he got up it was an effort for him to move around; that he has driven plaintiff to Phoenix five or six times because he could not use his arm; that he has never seen plaintiff drive a tractor; that he has seen him in a pickup looking at his place; has never seen plaintiff walking in his fields; has seen him walk on the lawn near the house; that plaintiff always uses a cane to help him in walking (220-222).

George L. Freestone (223), plaintiff's witness, testified in part: That he has known plaintiff for about

fifteen years; that several times he took plaintiff to council meetings of Water Users' Association because plaintiff was unable to handle his automobile; that plaintiff was very much handicapped in getting around (222-223); that it was hard for plaintiff to get in and out of automobile and he sometimes had to have help; that plaintiff was not always able to go to council meetings; that it was very hard for plaintiff to walk and that ever since he had known him plaintiff had used a cane; that he never saw plaintiff do any work; that plaintiff went on inspection trips for Water Users' Council; that plaintiff performed his duties as chairman of Water Users' Council whenever there, and was capable of taking care of business of the Water Users' Association (223-227).

Louise Lind (227), connected with the rural school, testified that plaintiff had been on the rural school board for thirteen years; since 1935 plaintiff has become increasingly lame, always walked with a cane; it was very hard for him to get around and walk; that plaintiff often came to board meetings when he should not, although school is only a mile from his place; that she would go to plaintiff's house for him to sign papers when he could not come; that plaintiff was consulted on questions relating to welfare of school and is capable of handling such affairs, but there isn't a great deal of handling (227-229).

Plaintiff's witness Charles Saylor (230), who does custom baling, testified in part: That prior to 1934 or 1935, plaintiff did not use cane, but after that time

used one. Before then plaintiff drove a tractor, plowed, baled his own hay and threshed his own grain. Since 1934 or 1935 plaintiff was working less and hiring more done. Since the middle of the 1930's he has never seen plaintiff do any work; that plaintiff needs a cane to get around and seems stiff and crippled. In coming to plaintiff's place he was always in the house. Has seen plaintiff lying down; has not seen plaintiff in the field over three or four times; has not seen plaintiff drive a tractor or do any other work; that when plaintiff was in the field he had to get back to the house and lie down (230-232). That while baling hay for other farmers they would come out in the field to supervise and inspect the hay, but the plaintiff would not (235).

Stella C. Hughes (236), wife of plaintiff, testified in substance that about 1935 plaintiff began getting stiff and complained of pain in his shoulders and back. Since that time he has gotten worse; she has seen plaintiff try to show a new man how to drive a tractor, but when he did so he came to the house in terrible pain and had to take aspirin and put an electric pad on his shoulders and back. Before plaintiff became ill he drove a tractor and did all kinds of farm work. That when plaintiff does any kind of work he soon comes to the house to obtain relief from pain. That he has not done any substantial amount of work at all since 1935. When plaintiff tries to work he is unable to sleep and he needs attention to relieve his pain (236-238).

Dr. H. L. Goss, a physician and surgeon specializing in X-ray work (67), who had never treated plaintiff, in 1938 made a number of X-ray pictures of various joints, bones and parts of body of plaintiff. These X-rays are in evidence as plaintiff's Exhibit 8. In September 30, 1948, he made another set of X-rays of the various bones, joints and parts of body of plaintiff. This set is in evidence as plaintiff's Exhibit 9. This doctor testified that the X-rays showed plaintiff to be suffering from a calcification of various joints and bones and a great amount of arthritis in his spine, joints and bones, to the extent in some joints of attachment or ankylosis; a great amount of arthritic changes in the bones, arthritic hooks, horns and buds. He testified that the X-rays of 1948 showed that since those taken in 1938 the plaintiff's arthritis had increased in extent and had continued to get worse from 1938 to 1948 (67-82).

Dr. J. H. Patterson (82), a physician and surgeon, testified in part: That plaintiff had been his patient since 1935 (83). He identified a set of X-rays, in evidence as plaintiff's Exhibit 10, taken in 1935 at his direction (83-84); that plaintiff was afflicted with arthritis in 1935 and in testifying from this X-ray film pointed out parts of the body and joints of plaintiff which were suffering from arthritis, arthritic budding and lipping (84-85); that he had been treating the plaintiff since 1935 and endeavoring to help him; that he had made studies of the X-rays taken by Dr. Goss in 1938 (Exhibit 8); that the plaintiff

was suffering from chronic multiple hypothrophic arthritis and his condition had gotten worse (85-86); that he had given plaintiff all kinds of treatment to try to alleviate the pain and suffering he has but that he was unable to do much for it; that the plaintiff has gotten progressively worse; that there had been an increase in deposits of calcium in nearly all of the plaintiff's joints, and through exercising, even though it is painful, he is able to keep motion in his joints but that the plaintiff cannot use them very much at a time because the joints give him too much pain and aggravate the condition (86); endeavoring to do any work or exercise makes the plaintiff feel worse and he has to go to bed at times; on account of the arthritis it would be hard for plaintiff to try to sit at a desk and write, because if he tries to use his joints it makes it just that much worse (87); from 1935 to the present time, in spite of treatments, plaintiff has gotten progressively worse; if he tries to walk about his ranch to any extent it aggravates his condition; that the plaintiff's condition is not normal for a man of his age (87). The doctor in his testimony compared the X-rays of 1935 with those of 1938 and 1948 and pointed out from them the fact that the plaintiff's arthritic condition had gotten much worse, his vertebrae grown together, and that the arthritis and bone changes had grown worse in many of plaintiff's bones and joints; that the plaintiff had lost a lot of calcium in his bones because of disuse; that such bones had gotten thin because of disuse; that the plaintiff's arthritis had gotten progressively worse; that there

are times when under treatment he was able to relieve the plaintiff of his pain but it was only temporary while being treated (87-91); that if the plaintiff endeavored to do any work it would irritate the condition present, would bring on more inflammation and cause more pain (93); that it would be harmful for the plaintiff to engage in any physical activity; would give him more pain and aggravate all his joints and make him so sore that he would have to go to bed; that the plaintiff would not be able to walk very far without having a good deal of pain and aggravation of his symptoms and that this has been his condition ever since 1935; that the excessive deposits of calcium and over-growth of bone structure in the joints of the plaintiff makes it very painful for him to try to move, as the bones have a rough surface; that the rough surfaces make it hard to use the joints; that the plaintiff will continue to get worse until absolutely helpless in bed (94-95); that the plaintiff is permanently and completely disabled; is totally disabled from doing any work; that the plaintiff can walk around but it gives him pain if he walks around too much, he can't stay at it too long, yet he is not completely helpless so far as lifting his hands and arms, feeding himself and clothing himself, but actual work of any kind cannot be done by the plaintiff (95-96).

Upon cross-examination, the following question was asked the doctor and the following answer given by him (97):

> Q. "If it should develop in the evidence in this case that Mr. Hughes does walk around his ranch and does drive a tractor and does do other substantial farm duties, then your opinion would not be worth much weight, would it doctor?"
>
> A. "Yes, I think it would be worth just as much as it was. I would say he has got a lot more guts and is a bigger fool than I thought he was." (97)

The doctor further testified that it was good for an arthritic patient to take exercise if it cleared up his joints but when it makes them sore it is very harmful; that he had tried exercise on the plaintiff but that he had to limit it and that such limitation is the reason why the plaintiff is able to get about as well as he does (97); that he told the plaintiff not to come to his office any more than he had to because he was running up big bills and the treatments were not doing him any good, but that he came in when he had so much pain to get diathermy treatments; that the experience of the doctor in the plaintiff's type of case is that exercise causes pain (98); that the atrophied condition of the plaintiff's bones shown in some of the X-rays was because the plaintiff was unable to exercise because of the pain and harm that such exercise caused him; that the plaintiff had pain because of

irritation from movement; that movement caused him irritation (99). The doctor further testified that in treating the plaintiff, he had given him all kinds of arthritic shots, arsenic shots, gold shots, relief for pain and diathermy, but he kept getting worse (100).

We submit that the foregoing evidence establishes that the plaintiff is and during the period in question was unable to perform the substantial and material acts of any occupation in the usual and customary manner, or at all; that he is unable to work in any occupation with reasonable continuity; that to work or attempt to work would be injurious to his health and entail pain and suffering which persons of ordinary fortitude would be unwilling to endure.

3. Telling a person to prepare and plant another's land, acting as administrator of an estate and performing other tasks of a trivial or sporadic nature does not negative total and permanent disability as those words are used in disability provision of insurance policy.

It was brought out on cross-examination that the plaintiff "called" someone and directed him to prepare and plant the forty acre farm of his sister to grain; that he acted as administrator of an estate, signed notes and a mortgage and made deposits in a bank. These activities do not negative total and permanent disability, when an insured is unable to perform the substantial and material acts of an occupation in the customary way.

Mutual Life Insurance Co. of New York v. *Dowdle* (Ark.), 189 Ark. 296, 71 S.W. (2d) 691, is a case

against this same defendant interpreting the identical disability clause involved herein. The business of the insured was that of farm manager and as such he had charge of a farm owned by himself, another by his wife, and a third by the Dowdle Estate in which he was interested as executor. For his management of this last named farm he had been paid $600.00 a year for the past several years. He had complete control of these places, paid the taxes thereon, prepared the chattel mortgages which the tenants executed, and made all other contracts relating to the management of the farms. These facts being undisputed, the defendant company insisted that the trial court should have declared as a matter of law that the insured was not totally disabled.

Before becoming disabled, the insured gave these farms a most active and efficient management, but since that time he had become less active so that his management was much less efficient. After becoming disabled, the insured's illness caused such pain and suffering that he was frequently unable to sleep at night and it caused him to spend much time lying down during the day. He admitted that he went to the bank and other places in the discharge of his duties, and drove his car without injury to himself.

Upon appeal from a judgment on the verdict in favor of the insured, the Supreme Court of Arkansas affirmed the judgment of the lower court upon the well established theory that the insured was totally and

permanently disabled, within the meaning of those terms as used in this policy, when infirmity rendered him unable to perform all substantial and material acts of his business, or the execution of those acts in the usual and customary way, or if performance of those acts would imperil his health or entail pain and suffering which persons of ordinary fortitude would be unwilling to endure.

The third and sixth headnotes to this case read:

> "3. To recover under disability clause of policy, insured need not be absolutely helpless, but is 'totally disabled' when infirmity renders him unable to perform all substantial and material acts of his business, or execution of those acts in usual and customary way.
>
> "6. As regards question whether insured was totally and permanently disabled under policy, law does not require one to peform duties at peril of life or health, or if performance entails pain and suffering which persons of ordinary fortitude would be unwilling to endure."

4. Farmers held to be totally and permanently disabled, when unable to perform substantial and material acts of an occupation, though able to perform some duties, light work or tasks of a sporadic nature.

There are many cases holding farmers to be totally and permanently disabled within the meaning of the provisions of the disability clause of an insurance policy where they have been disabled to such a degree that they are unable to perform the material and substantial acts of an occupation, or unable to perform

such acts in usual and customary way, although they can perform some duties and transact some business pertaining to their occupation. In many of these cases the farmer in question could and did do more work than the evidence in the case at bar shows that the plaintiff was able to do. The citations to some of these cases are as follows:

Atlantic Life Ins. Co. v. *Worley*, 161 Va. 951, 172 S.E. 168.

Hoover v. *Mutual Trust Life Ins. Co.*, (a leading Iowa case), 225 Iowa 1034, 282 N.W. 781.

Jefferson Standard Life Ins. Co. v. *Curfman* (Texas), 127 S.W. (2d) 567.

Manuel v. *Metropolitan Life Ins. Co.* (La.), 139 So. 548.

Katz v. *Union Cent. Life Ins. Co.* (Mo.), 226 Mo. App. 618, 44 S.W. (2d) 250.

Colovos v. *Home Life Ins. Co. of New York*, 83 Utah 401, 28 P. (2d) 607.

Maresh v. *Peoria Life Ins. Co.*, 133 Kan. 191, 299 P. 934.

New England Mut. Life Ins. Co. v. *Huckins*, 127 Fla. 540, 173 So. 696.

National Life & Accident Ins. Co. v. *Bradley*, 245 Ky. 311, 53 S.W. (2d) 701.

Guardian Life Ins. Co. v. *McMurray*, 105 Colo. 11, 94 P. (2d) 1086.

John v. *Aetna Life Ins. Co.* (Mo.), 100 S.W. (2d) 936.

Foglesong v. *Modern Brotherhood*, 121 Mo. App. 548, 97 S.W. 240.

5. Disabled farmer's ability to successfully carry on farming operations through foreman or "proxy" does not negative total and permanent disability.

The evidence in this case shows that the plaintiff, Thomas J. Hughes, though not driving, took two automobile trips and also a train trip, and was able to carry on farming operations by hiring a foreman to supervise and direct the work. The evidence also showed the farm, so being operated, to earn a substantial income.

In *John Hancock Mut. Ins. Co.* v. *Magers*, 199 Ark. 104, 132 S.W. (2d) 841, a farmer suffering a disability, took automobile trips and attended to his farming interests very successfully with the help of a foreman. The court in holding this farmer to be totally and permanently disabled within the meaning of his policy, said:

> "The insurance contract is not discharged because he may be able to hire a substitute or proxy".

This case also holds that the fact that the insured's farm makes substantial earnings while being operated with the aid of a foreman does not preclude recovery.

6. Ability of disabled farmer and dairyman to keep account of his operations, go to bank, ride in automobile, write checks to pay help and act on school board does not preclude recovery under disability clause of policy, if unable to perform substantial acts of his calling.

The evidence in the case at bar discloses that the plaintiff, Thomas J. Hughes, was able to keep an account of his farm and dairy operations, go to the bank, ride in an automobile, write checks to pay the help, and was a member of a school board. A similar state of facts was passed upon in a New Jersey case against this same defendant, brought to enforce payment of benefits under a policy containing the identical disability provision of the policy involved in the case at bar. The insured was held to be totally and permanently disabled within the meaning of the disability clause of the policy. This case is:

Raub v. *Mutual Life Insurance Co. of New York*, 126 N.J.L. 164, 18 A. (2d) 37.

The second and third headnotes of this case read:

> "An insured farmer and dairyman who was unable to do the things required in his calling was 'totally and permanently disabled' within disability provisions of life policies, notwithstanding he was able to do many things such as going to the bank, tending to incidental chores about the farm, paying the help, keeping accounts, riding in automobile when milk was delivered to retail trade by his son, and acting as secretary to the local school board."

"In action for disability benefits under life policies, evidence was sufficient for jury concerning disability of insured for the period of time for which suit was brought".

7. Persons suffering from arthritis to extent that they cannot perform substantial and material acts of an occupation are held to be totally and permanently disabled, though they can perform some tasks.

The evidence shows the plaintiff, Thomas J. Hughes, to be suffering from a bad case of arthritis, so that he is able to do but a few trivial things. Persons suffering from arthritis which prevents them from performing the substantial and material acts of an occupation in the usual and customary manner, though they can do some work are held to be totally and permanently disabled.

Hoover v. *Mutual Trust Life Ins. Co.* (supra).

Colovos v. *Home Life Ins. Co. of New York* (supra).

Other cases so holding are:

Aetna Life Ins. Co. v. *Spencer*, 182 Ark. 496, 32 S.W. (2d) 310.

New York Life Ins. Co. v. *McLean*, 218 Ala. 401, 118 So. 753.

Guy v. *Aetna Life Ins. Co.*, 206 N.C. 118, 172 S.E. 885.

New York Life Ins. Co. v. *Best*, 157 Miss. 571, 128 So. 565.

Aetna Life Ins. Co. v. *Norman*, 196 Ark. 381, 117 S.W. (2d) 728.

8. Law does not require insured to perform duties at peril of health or if performance entails pain and suffering which persons of ordinary fortitude would be unwilling to endure.

The evidence in this case discloses that the doing of any work by the plaintiff, exercising or even writing, causes him great pain, makes him sick, unable to sleep and causes his joints to become inflamed and his arthritis to be worse. Aside from this, the plaintiff is all right organically. The law does not require an insured to perform duties at the peril of his health, although he may have the strength, nor perform them if their performance entails suffering and pain which a person of ordinary prudence or fortitude would be unwilling or unable to endure. The fact that an insured suffering a disability does work is not the proper test to be used in determining whether such insured person is totally and permanently disabled. The true test is whether or not he is able to work, as a disabled person may work when due prudence would require him to desist from working. The issue of insured's ability to work is question of fact for jury to determine. Many of the cases heretofore cited are authority for the foregoing statements. (See *Aetna Life Ins. Co.* v. *Norman*, supra) Other cases to the same effect are:

Aetna Life Ins. Co. v. *Davis*, 187 Ark. 398, 60 S.W. (2d) 912.

Fitzgerald v. *Globe Indemnity Co.*, 84 Cal. App. 689, 258 P. 458.

Massachusetts Bonding & Ins. Co. v. *Worthy* (Tex), 9 S.W. (2d) 388.

Temples v. *Prudential Ins. Co.*, 18 Tenn. App. 506, 79 S.W. (2d) 608.

Wright v. *Prudential Ins. Co.*, 12 Cal. App. (2d) 195, 80 P. (2d) 752.

Millis v. *Cont. Life Ins. Co.*, 162 Wash. 555, 298 P. 739.

Mutual Life Ins. Co. v. *Dowdle*, supra.

9. Insured, whose disability prevents him from working with reasonable continuity is totally and permanently disabled even though he is able to work at times.

Many of the courts hold that although an insured may do work at times, he is totally and permanently disabled within the meaning of the disability clause of his policy, if he cannot work with reasonable continuity. Some of the cases heretofore cited announce this rule. Other cases so holding are:

Wilson v. *Metropolitan Life Ins. Co.*, 187 Minn. 462, 245 N.W. 826.

Misskelley v. *Home Life Ins. Co.*, 205 N.C. 496, 171 S.E. 862.

Carson v. *New York Life Ins. Co.*, 162 Minn. 458, 203 N.W. 209.

Leonard v. *Pacific Mutual Life Ins. Co.*, 209 N.C. 523, 183 S.E. 723.

In *Leonard* v. *Pacific Mutual Life Ins. Co. of Calif.*, the case last above cited, the facts were that a farmer who had an insurance policy providing for certain benefits in the event he became totally and permanently disabled, suffered a disability due to some nervous

infection that caused him to be sore and nervous. He could work at times. He could not, however, work with reasonable continuity. The plaintiff's evidence in this North Carolina case was somewhat conflicting. The testimony of some of the plaintiff's witnesses did not tend to support his claim of total and permanent disability. At the close of the plaintiff's case the defendant insurance company moved to dismiss the action, and for judgment as of nonsuit upon the ground that plaintiff had failed in his proof. The lower court upheld the defendant's contention and judgment was rendered against the plaintiff, whereupon he appealed. The Supreme Court of North Carolina held that whether the insured farmer was totally and permanently disabled within the disability clause of his policy was a question for the jury to decide and reversed the case, even though the plaintiff's own evidence was somewhat conflicting. Reading at page 725 of Vol. 183 Southeastern Reporter, we quote the following from the opinion of the case:

> "While there are other portions of the testimony of these witnesses that do not tend to support the contentions of the plaintiff, all of the evidence, when construed in the light most favorable to the plaintiff, we think was sufficient to be submitted to the jury, and therefore hold that the trial judge erred in sustaining the motion for judgment as of nonsuit."

10. In cases where there is evidence of a capital investment and its management the test of total disability of insured is whether he would be able to procure employment in the open labor market in the same capacity in which he is managing his investments and is jury question.

It was brought out in the evidence in the case at bar that the plaintiff was the owner of a 412 acre farm and dairy from which he received an income; that he was able to give his investment some management, although such management was very slight. The fact that an insured receives income from his investments does not negative his right to recovery under a disability clause in an insurance policy such as that involved in the case at bar. Furthermore, in a case where there is evidence of disability on the part of an insured, and also evidence of a capital investment and some management thereof by the insured, the test of total disability of the insured is whether he would be able to procure employment in the open market in the same capacity in which he is managing his investments, and under the evidence is a question of fact for the jury to decide. As authority we cite the following cases:

Boughton v. *Mutual Life Ins. Co.*, 183 La. 908, 165 So. 140.

Lorentz v. *Aetna Life Ins. Co.*, 197 Minn. 205, 266 N.W. 699.

Bubany v. *New York Life Ins. Co.*, 39 N.M. 560, 51 P. (2d) 864.

Pacific Mutual Life Ins. Co. v. *McCrary*, 161 Tenn. 389, 32 S.W. (2d) 1052.

Mercantile Commerce Bank & Trust Co. v. *Equitable Life Assur. Soc.* (D.C.), 48 Fed. Supp. 561.

Comfort v. *Travelers Ins. Co.* (Mo.), 131 S.W. (2d) 134.

Erreca v. *Western States Life Ins. Co.* (supra).

Hoover v. *Mutual Trust Life Ins. Co.* (supra).

Mutual Life Ins Co. v. *Dowdle* (supra).

John Hancock Mut. Ins. Co. v. *Magers* (supra).

Anair v. *Mutual Life Ins. Co. of New York*, 114 Vt. 217, 42 A. (2d) 423, is another case dealing with a capital investment, income therefrom, and some management thereof. This is another case against this same defendant involving the same disability clause in question. The insured, prior to becoming disabled, was a lawyer and stenographer. Her disability forced her to give up this work. She bought an apartment house, supervised its remodeling, attended to purchasing of furniture, various other things, and the renting of apartments; she collected rents, handled coupons for oil which the tenants used, and hired the cleaning work done, which she supervised. When she attempted to do some of the work, she had to go to bed. She had done some sweeping, had attempted to do some scrubbing, but when she attempted to move or lift furniture she suffered for it. When she exercised she had shortness of breath and she was dizzy a great deal of the time. At the close of the plaintiff's case, the defendant company moved for a directed verdict upon the ground

that there was no evidence in the case to support a finding that the plaintiff was totally disabled within the meaning of the policy and that the evidence showed that at all material times plaintiff followed a gainful occupation of managing an apartment house with no impairment which continuously rendered it impossible for her to carry on that occupation.

Reading at page 430, paragraphs 11, 12 of the opinion, 42 A. (2d), the court said:

> ". . . we are unable to say as a matter of law that the plaintiff was not totally disabled in contemplation of the provisions of the policy in question. The evidence made the question of the plaintiff's total disability one of fact for the jury under proper instructions".

At page 431, paragraph 13 of the opinion the court further said:

> "In cases such as this which involve a capital investment and its management, a test of the total disability of the insured is whether he would be able to procure employment in the open labor market in the same capacity in which he is managing his investments". (citing cases)

At page 433, paragraph 21, the court said:

> "It is universally held that the fact that an insured receives income from his investments does not deprive him of his right of recovery under a total disability provision such as the one here in question. (citing cases) The fact that an insured may be able to do some acts

or perform some duties in connection with the management of his investment does not bar him from a recovery if he is disabled from following that occupation under the test set forth in the Clarke case, supra".

The citation to the Clarke case referred to is:

Clarke v. *Travelers Ins. Co.*, 94 Vt. 383, 111 A. 449, 450.

This Clarke case likewise holds that evidence of this type makes the question of disability one of fact for the jury, and that the court cannot say, as a matter of law, that the insured is not totally disabled. Other cases in which the court held similar evidence sufficient to take the case to the jury are:

Kane v. *Metropolitan Life Ins. Co.*, 228 Mo. App. 649, 73 S.W. (2d) 826.

Stoner v. *New York Life Ins. Co.* (Mo. App.), 90 S.W. (2d) 784.

Aetna Life Ins. Co. v. *Phifer*, 160 Ark. 98, 254 S.W. 335.

New York Life Ins. Co. v. *Bain*, 169 Miss. 271, 152 So. 845.

11. Disability insurance is not indemnity against loss of income but against loss of capacity to work for compensation or profit.

Policies providing benefits for the insured in the event he becomes totally and permanently disabled are not indemnity against loss of income, but against loss

of capacity to work for compensation or profit. This is the holding in *Erreca* v. *Western States Life Ins. Co.*, supra, *Mutual Life Ins. Co.* v. *Dowdle*, supra, and other cases heretofore cited. To the same effect is:

Great Southern Life Ins. Co. v. *Johnson* (Texas) 25 S.W. (2d) 1093.

12. Evidence to the effect that insured does work or does earn is not sufficient to take the question of total and permanent disability from the jury if there is also evidence that insured is suffering a disability.

The fact that an insured suffering disability holds down a job and earns an income does not necessarily preclude recovery under the disability provisions of a policy or negative total and permanent disability. While what an insured does or earns is a fact to be considered by the jury in determining total disability, the test of total and permanent disability is not what an insured does or earns. The test is what the insured is able to do. When an insured proves that he is suffering a disability, then the issue of whether or not he is totally and permanently disabled within the meaning of those words as used in an insurance policy, becomes a question of fact for the jury to decide. It is not one of law for the court to decide.

Authority for this theory is borne out by many of the cases heretofore cited and as further authority we cite.

Caldwell v. *Volunteer State Life Ins. Co.*, 170 S.C. 294, 170 S.E. 349.

In this above cited South Carolina Case a directed verdict was granted upon motion of the defendant insurance company. The facts were that the insured was a clerk of a court. He had been adjudicated insane but he thereafter continued to act as clerk and to draw his salary. In a suit to recover disability benefits under the terms of a policy the testimony touching the mental and physical condition of the insured was conflicting. Upon appeal, the Supreme Court, notwithstanding the fact that the insured continued to hold his position and draw a salary, reversed the trial court and in so doing held that the issue of the insured's total and permanent disability was a question of fact for the jury to determine. The First, Second, Third and Fourth Headnotes to this case read as follows:

> "In action on disability policy, whether condition of insured was such as to constitute permanent total disability held for jury.
>
> In passing on motion for nonsuit and for directed verdict, evidence must be taken in light most favorable to plaintiff.
>
> In passing on motion for nonsuit and for directed verdict, it is not court's function to weigh testimony, but to determine if there is any relevant competent testimony reasonably tending to establish material elements of plaintiff's cause of action.
>
> In action on disability policy, whether insured clerk of court who was adjudged insane, but continued to act as clerk, was permanently

disabled, and whether he was incapable of furnishing proof of such disability, and whether beneficiary gave notice with reasonable promptness, held for jury."

13. Absolute lack of earning power or ability to do any work not required in order to be classed as totally and permanently disabled.

The evidence in this case shows the plaintiff to be a member of the council of a Water Users' Association which regularly meets four times a year and that he is able to attend most of these meetings with the aid of friends. The plaintiff receives $4.10 for each meeting he attends. This fact does not preclude recovery. Compensation received by an insured for services performed would have to be substantial, the work done amount to a job, together with ability to do the job, in order to defeat recovery. Recovery for total permanent disability does not require absolute lack of earning power on the part of the insured. Such is the ruling in:

Colovos v. *Home Life Ins. Co.* (supra).

Dunlap v. *Maryland Casualty Co.*, 203 S.C. 1, 25 S.E. (2d) 881.

Pacific Mutual Life Ins. Co. v. *McCrary*, 161 Tenn. 389, 32 S.W. (2d) 1052.

Principi v. *Columbian Mutual Life Insurance Co.*, 169 Tenn. 276, 84 S.W. (2d) 587.

Burns v. *Aetna Life Ins. Co.*, 234 Mo. App. 1207, 123 S.W. (2d) 185.

Equitable Life of U. S. v. *Boyd*, 51 Ariz. 308, 76 P. (2d) 752.

14. Insurer cannot avoid payment of benefits because theoretically insured could educate himself for non-manual employment or because of possibility he might fit himself for some calling.

Defendant's counsel cross-examined plaintiff at length concerning his education and brought out that for three or four years he had attended a normal school or teacher's college, the curriculum of which combined high school and normal school subjects. The plaintiff had not obtained a teacher's certificate or ever taught school. The plaintiff is a man seventy-two years of age and has been a farmer most of his life. He is so disabled that he cannot work or even sit at a desk and write for any length of time (87). The only conclusion that can be drawn from the evidence taken as a whole is that the plaintiff cannot now, nor could he at any time since he became disabled, fit himself for, or do, any type of work at all which would produce a livelihood. The defendant was advised that the plaintiff was a farmer in his application for the policy (16).

If there were a possibility that the plaintiff could fit himself for some other remunerative occupation, the defendant cannot urge the point. The law is settled that an insurer cannot avoid the payment of benefits because theoretically the insured could educate himself for non-manual employment or because there is a mere possibility that by education or otherwise he might at some time in the future in some way fit himself for some calling and become able to earn a living. The plaintiff, in this case, considering his age and crippled up condition, could not reasonably be expected

to complete his education to become a school teacher and then teach school. As authority for this contention we cite the following cases:

Buis v. *Prudential Ins. Co.* (Mo. App.), 77 S.W. (2d) 127.

Gibson v. *Equitable Life Association Society* (Utah), 36 P. (2d) 105.

Nickolopulos v. *Equitable Life Assur. Soc. of U. S.*, 113 N.J.L. 450, 174 A. 759.

Jefferson Standard Life Ins. Co. v. *Curfman*, supra.

15. Not essential to entitle insured to receive benefits in case of his total and permanent disability, that he establish he will be disabled remainder of his life.

As to the permanency of the disability of the plaintiff in the case at bar there can be no doubt. The evidence conclusively discloses that the plaintiff became totally disabled in the year 1935; that his disability has become progressively worse ever since that time, and that he will continue to get worse until absolutely helpless in bed (94-95). This proof is of greater quantam than required to establish permanency of disability in this type of case. The proof required to establish permanency of disability is passed upon in:

Johnson v. *Mutual Life Insurance Co.*, 269 Ill. App. 471.

This Illinois case construes the identical disability provision involved in this case against this same defendant insurance company. The court's ruling is reflected in the First and Second Headnotes to the case, which read as follows:

"1. Where an insurance policy providing for total and permanent disability benefits also provides that the insurer will, 'during the continuance' of the disability, waive the payment of premiums and will pay the insured a specified income, and that the insurer may, at any time, have the insured examined to determine whether or not he is totally and permanently disabled, and that if it shall appear that he is able to work, no further premium shall be waived or income paid, it is not essential, to entitle the insured to receive such benefits in case of his total and permanent disability, that he shall establish that he will be disabled for the remainder of his life, but whenever it appears that the plaintiff is totally disabled and that this disability will, as far as can be ascertained at the time, be permanent, the insured should receive the income and have the premiums waived from the time the fact of disability is determined until he recovers or dies.

2. Whether one who contracted pulmonary tuberculosis would, within the meaning and provisions of the disability clause of an insurance contract under which he sought to recover, be totally, permanently, continuously and wholly prevented from performing any work for compensation and from following any gainful occupation, was a question of fact for the jury to determine from a consideration of the testimony."

16. Other cases against this defendant which uphold the plaintiff's contentions in this case.

The following are citations to other cases against this same defendant interpreting the identical disability clause in question, and other clauses of similar meaning. These cases uphold the plaintiff's contentions in this case, and involve farmers and other persons who have been held to be totally and permanently disabled where they could not perform the substantial and material acts of an occupation in a customary and usual manner, although they could give some supervisory attention, perform tasks of a sporadic nature, or do light work:

Mutual Life Insurance Co. v. *Oliff*, 62 Ga. App. 845, 21 S. E. (2d) 534.

Mutual Life v. *McDonald*, 25 Tenn. App. 50, 150 S. W. (2d) 715.

Mutual Life v. *Marsh*, 186 Ark. 861, 56 S. W. (2d) 433.

Phillips v. *Mutual Life*, 155 So. 487 (La. App.).

Losnecki v. *Mutual Life*, 106 Pa. Super. Ct. 259, 161 A. 434.

Smith v. *Mutual Life* (La. App.), 165 So. 498.

Mutal Life Ins. Co. v. *Childs*, 64 Ga. App. 657, 14 S. E. (2d) 165.

Boughton v. *Mutual Life*, 183 La. 908, 165 So. 140.

Brown v. *Mutual Life* (Mo.), 140 S. W. (2d) 91.

Mutual Life v. *Beckman*, 261 Ky. 286, 87 S. W. (2d) 602.

Mutual Life Ins. Co. v. *Rackley*, 66 Ga. App. 89, 17 S. E. (2d) 190.

17. The few early cases holding disability provision should be literally construed no longer sound law.

There are a few early cases which adhere to a strict rule of interpretation of the words used in the disability clause of an insurance policy. These cases are no longer sound law. This is pointed out in a discussion of this matter by the writer in:

149 A.L.R. 11, 12.

This writer, in speaking of the more liberal rule, states as follows:

> " . . . This rule is so general and so well settled that it is needless to cite authorities for it."

The writer speaks of Iowa at one time adhering to the more literal construction, but points out that the Iowa court expressly overruled this construction in *Hoover* v. *Mutual Trust Life Insurance Co.* (supra).

18. Insurance company cannot prevail in claiming that disability clause does not cover risks which it has been adjudicated to cover under consistent judicial course of construction.

When the defendant in this case issued the type of policy involved herein, providing for certain disability benefits, it knew the risk it was assuming, fixed the amount of premium accordingly, and the defendant

should not be permitted to now shirk its obligation under the contract. The courts for many years have interpreted the meaning of disability clauses of similar import to the one used in the policy involved in this case. In this brief we have cited quite a number of cases against this same defendant where the courts have, over the years, interpreted the identical disability clause involved in this case. When the defendant issued its policy to the plaintiff in this case, it knew that the courts had theretofore construed the words "totally and permanently disabled" as used in the policy not to mean, as their literal construction might be claimed to require, a state of absolute helpessness, but that such words contemplate, rather, such a disability as renders the insured unable to perform, in the customary and usual manner, the substantial and material acts of his occupation or any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity. Accordingly the defendant cannot now claim that those words should be literally construed so as to preclude recovery in this case.

In the case of *Prudential Ins. Co.* v. *Harris*, 254 Ky. 23, 70 S.W. (2d) 949, the court used the following language (reading at pages 953 and 954, 70 S.W. (2d)):

> "It has been said, and no doubt is true, that uniformity of decision on questions of insurance in the several states is very desirable and necessary, and where an insurance company con-

tinues to issue policies without any modification of their terms, after certain provisions thereof have been judicially construed, it should not be heard to insist, in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been adjudged to cover before they were issued . . .".

". . . But, when contracts have been made under the authority of a consistent judicial course of construction, it should be a very compelling situation that would warrant a change which would adveresly affect rights acquired under that policy."

9. Insurance policy should be construed most strongly against the company.

An insurance policy is not written as the result of egotiations between the parties to the contract, but s prepared by one party only, the company. Such policy hould be construed most strongly against the company nd most favorable to the insured.

Gibbons v. *Metropolitan Life Ins. Co.* (1938), 62 Ohio App. 280, 23 N. E. (2d) 662, (Affirmed in 1939, 135 Ohio St. 481, 21 N. E. (2d) 588).

Industrial Mutual Indemnity Co. v. *Hawkins*, 94 Ark. 417, 127 S.W. 457.

0. Liberal construction rule prevails in this jurisdiction.

The contention that the words "totally and permanently disabled" as used in an insurance policy hould be construed liberally rather than literally has

been upheld in this jurisdiction by the following Arizona and Ninth Circuit Court cases:

Equitable Life Assur. Soc. of U. S. v. *Boyd*, 51 Ariz. 309, 76 P. (2d) 752.

U. S. v. *Lawson* (CCA 9th), 50 F. (2d) 646.

U. S. v. *Sligh* (CCA 9th), 31 F. (2d) 735.

21. Conclusion.

The questions involved in this case have been in the courts many times. The cases on the subject are collected in a number of annotations in A.L.R. An examination of these annotations will disclose that the theory and contentions of the plaintiff in the case at bar are correct. The citations to the more recent and most extensive of these annotations are:

79 A.L.R. 857.

98 A.L.R. 788.

149 A.L.R. 7.

Earlier annotations are found in:

24 A.L.R. 203.

37 A.L.R. 151.

41 A.L.R. 1376.

51 A.L.R. 1048.

We respectfully submit that at the close of the plaintiff's case there was, under the well established law, ample evidence to require submission to the jury for determination the question of whether the plaintiff had become totally and permanently disabled within the meaning of his policy. To hold otherwise would be equivalent to a practical denial of that which the premium was supposed to be buying, as was said in *Prudential Insurance Company* v. *Harris*, 254 Ky. 23, 70 S. W. (2d) 949, and as was said in *Equitable Life Assur. Soc. v. Serio* (supra) would convict an insurance company of having put out among our people and having collected from them premiums on a policy provision which in effect would be scarcely more than a cheat, a pretense and a fraud.

The plaintiff respectfully asks that the judgment and ruling of the trial court be reversed, and the case remanded to the District Court for a new trial.

Respectfully submitted,

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